No. 22368

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM J. FOX, JR., ET AL., Appellants

v.

UNITED STATES OF AMERICA, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

# REPLY BRIEF OF APPELLANTS FOX

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# I N D E X



## TABLE OF CASES



## OTHER CITATIONS

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## REPLY TO ARGUMENT OF RESPONDENT

## I.

## THE FLOYD TO FOX SALE

The respondent, commencing on page six sets forth his argument to support the proposition that the District Court properly exercised its discretion in excluding the Floyd to Fox sale.

The place of comparable sales in condemnation actions once a matter of some controversy, is now settled. Comparable sales are admissible as they are of real value to the trier of the fact in determining the fair market value of the subject property; that is, the fair market value of the property taken or affected by the instant condemnation proceeding. 1 Orgel on Valuations, §136, et seq.

The rule admitting comparable sales is often called the Massachusetts rule. The rule rejecting comparable sales as introducing collateral issues and inflicting too much surprise upon opposing counsel and as constituting hearsay, is the Pennsylvania rule. This rule was developed in Nebraska, New York, and Pennsylvania. However, virtually all courts have now rejected this minority rule and have adopted the Pennsylvania rule. Many of the rules restricting comparable sales stem from the early development of the minority rule.

Counsel first contends that comparable sales, to be admissib must have been sales for cash or its equivalent. This, however, is no longer the law, if it ever was the law. See Bartlett v. Medford, 252 Mass. 311, 147 N.E. 739 where the court said:

> "The fact that the price for the property was paid in large part by mortgages did not affect the competency of the testimony, provided the sale was a genuine one."

To the same effect see Sheehy v. Inhabitants of Weymouth, 266 Mass. 165, 164 N.E. 819; Fourth National Bank v. Boston and the Commonwealth, 212 Mass. 66, 98 N.E. 686; Forest Preserve District v. Barcher, 293 Ill. 556, 127 N.E. 878; United States v. Certain Parcels of Land, 144 F. (2d) 626, (Ca. 3). The first point made by respondent is therefore without merit.

Next, counsel contends on pages 8 and 9 of his brief that in any event the broad discretion of the District Court justifies the exclusion. However, failure to admit a comparable sale is a violation of the majority rule

above referred to unless there is some element that indicates that the rule is legally insufficient; i.e., that there was some coercion so that either the buyer was not acting freely or the seller not acting freely. Such however, was not the case here.

Counsel urges that the discretion was justified by virtue of the fact that the property sold was in the general vicinity of the freeway. However, Mr. Fox testified that he bought the property in order to utilize it it as his base of operations for the house moving business he had operated on the subject property. He had explained that the freeway had nothing to do with his selection as the Highway Department did not permit him or others to move houses on the freeway, and that its existance was actually a hindrance to him. That he had searched all over the Valley and could find nothing on U. S. 97 or elsewhere that would serve the purpose that was as cheap as he could buy the Floyd property. Under these circumstances the court should have admitted the testimony. The weight of it was for the jury. See U. S. v. 63 Acres, 245 F. (2d) 140, where the court said at page 144:

> "There is no absolute rule which precludes the consideration of subsequent sales. The general rule is that evidence of "similar sales in the vicinity made at or about the same time" is to be the basis for the valuation and evidence of all such sales should generally be made admissible. United States v. 5139.5 Acres of Land, etc., 4 Cir., 1952, 200 F. 2d 659, 662; 1 Orgel, Valuation Under Eminent Domain, § 139 (2d Ed. 1953), including subsequent sales. Cf. People ex rel. Horowitz v. Mitter, 1st Dept. 1944, 267 App. Div. 897, 47 N.Y.S. 2d 168; People ex rel. Four Park Ave. Corp. v. Lilly, 1st Dept. 1942, 265 App. Div. 68, 37 N.Y.S. 2d 733,

737-738. The generality of this rule is limited, however, by the consideration that a condemnation itself may increase prices and the government should not have to pay for such artificially inflated values. See International Paper Co. v. United States, 5 Cir., 1955, 227 F. 2d 201. But that possibility does not produce a hard and fast exclusionary rule. In every case it is a question of judgment as to the extent of this danger and, particularly where a judge is sitting without a jury, it would seem the better practice to admit the evidence and then to weigh it having due regard for the danger of artificial inflation.

"In this case the importance of the evidence far outweighs any possible danger of its representing artificially inflated values for as noted, evidence of the September sale is crucial to the basic issue of whether rezoning of the area south of the Boulevard also raised values on the northern property. We therefore hold that it was an abuse of discretion not to admit and consider the evidence of the sale of government property north of the Boulevard in September on the issue of the value of the defendants' property, and reverse and remand for a new trial."

See also Burchell v. Commonwealth, 215 N.E. (2d) 649, (Mass. 1966)

See also Commonwealth v. Goehring, 408 S.W. (2d) 636 (Ky. 1966)

where the Court said on page 638:

"Since there may be a new trial we make two observations: (a) If the remainder of this farm was sold within a reasonable time after this taking, its sale price is admissible as a comparable sale unless lack of comparability is established. Commonwealth, Department of Highways v. Gibson, Ky., 401 S. W. (2d) 71; (b) the instructions in Commonwealth, Department of Highways v. Priest, Ky., 387 S.W. 2d 302, should be submitted to the jury. We find the other ground of alleged error to be without merit.

"The judgment is reversed with directions to grant a new trial."

Clearly, the Floyd to Fox sale should have been admitted.

II.

REPRODUCTION COST OF STRUCTURES

Counsel evidently concedes that this evidence was admissible. He says, on page 13:

> "Replacement or reproduction cost less depreciation is one of the least reliable inditia of market value."

Nevertheless, even though it may not be conclusive, it is an important help to the trier of fact. This is particularly true in the situation where the property is being used for its highest and best use and the buildings were built for and are adaptable for that specific purpose. It hardly seems possible that such reproduction costs less depreciation is excludable. See United States v. City of New York, 165 F. (2d) 526. Counsel cites 2 Orgel, Valuation under Eminent Domain, 2nd Edition, 1953, pages 3 and 4. However, on page 9 this authority concludes as follows:

> "It is now the prevailing rule that estimates of reproduction cost may be introduced on direct examination whenever the buildings are well adapted to the land on which they stand."

See also Standard Oil Company v. Southern Pacific Company, 268 U. S. 146, 69 Law. Ed. 890; 45 Sup. Ct. 465; Albert Hanson Lumber Company v. U. S., 261 U. S. 581, 67 Law Ed. 809, 43 Sup. Ct. 442; United States v. Benning Housing Corporation, (Ca. 5) 276 F. (2d) 248; Ranck v. Cedar Rapids, 134 Iowa 563, 111 N. W.1027; Gloucester Water Supply Company vs. Gloucester, 179 Mass. 365, 60 N. E. 977; Appleton Water Works Co., v. Railroad Commission, 154 Wis. 121; 142 N. W. 476; State v. Redwing Laundry and Drycleaning Company,

253 Minn. 570; 93 N. W. (2d) 206; 44 Minn. Law Review, 162; North Carolina v. Privett, 246 N. C. 501, 99 S. E. (2d) 61; 172 A.L.R. 244.

When there was no property with comparable improvements that were established as comparable sales, it seems hard to justify the exclusion of reproduction cost less depreciation in the situation where we are dealing with property which has been improved by improvements that were built for and actually used and in use for even the highest and best use testified to by the appraisers for the Government.

It is respectfully submitted that the trial court was in error and that a new trial court should be granted as prayed for in appellant's opening brief.

Respectfully submitted,

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